IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-849

**ANTHONY ZIZZO,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## TABLE OF CONTENTS



## CITATIONS

*Cases*

*Other Authorities*



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Anthony Zizzo petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINION BELOW

The Opinion of the Court of Appeals (App. A) was issued on September 27, 1978 and was unpublished pursuant to Seventh Circuit Rule 35.

On October 26, 1978 the United States Court of Appeals for the Seventh Circuit denied petitioner's petition for a rehearing (App. B).

## JURISDICTION

The jurisdiction of this Court to review the opinion of the Court of Appeals is invoked pursuant to 28 U.S.C. §1254(1). Anthony Zizzo was found guilty by a federal criminal jury of violating 18 U.S.C. §371 (App. C). The jurisdiction of the United States Court of Appeals for the Seventh Circuit to review Zizzo's conviction was invoked pursuant to 28 U.S.C. §1291.



## QUESTIONS PRESENTED

I. Whether evidence not included in the court-ordered government's bill of particulars can be introduced at trial, consistent with Fed.R.Crim.Proc., 7(f) where:

(a) Such evidence was in the government's possession prior to trial; and

(b) Such evidence by its very nature was within the parameters of the bill of particulars defining an overt act of a conspiracy indictment; and

(c) Such evidence supplied a necessary element of the government's conspiracy case.

II. Whether in a multi-defendant conspiracy trial the court committed prejudicial error while instructing the jury as to "accomplice testimony" where:

(a) The bulk of the government's evidence was "accomplice testimony" and such testimony was both inculpatory and exculpatory as to petitioner; and

(b) The "accomplice testimony" instruction discussed solely conviction upon accomplice testimony; and

(c) The "accomplice testimony" instruction required the jury to believe "accomplice testimony" beyond a reasonable doubt before it could be accepted.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Rule Criminal Procedure, 7(f):

> "*Bill of Particulars.* The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to conditions as justice requires. As amended Feb. 28, 1966, eff. July 1, 1966; April 24, 1972, eff. Oct. 1, 1972."

Constitution of the United States, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."



## STATEMENT OF THE CASE

Petitioner, Anthony Zizzo (hereinafter referred to as Zizzo), and ten (10) others were charged with a 2½ year conspiracy to receive and dispose of television sets in violation of 18 U.S.C. §2315 and the general conspiracy statute, 18 U.S.C. §371.[1] Twelve (12) overt acts were set forth in support of the indictment. Pursuant to defendants' motion and a resultant order by the trial court, the government filed a bill of particulars detailing the activities alleged in support of each of the twelve (12) overt acts.[2]

Zizzo was named in overt acts three (3) through five (5).[3] Zizzo's precise role in each of the overt acts alleged was defined in the bill of particulars as to its date, time, location and defendants present.

*Overt Act 3* stated that between January 15 and February 26, 1974 Zizzo and his alleged seventeen (17) co-conspirators hatched their scheme to dispose of television sets. This is the sole overt act that includes all of the indicted and unindicted co-conspirators.

The *Bill of Particulars* relating to *Overt Act 3* disclosed some fourteen (14) meetings; Zizzo allegedly attended

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[1] The indictment contained seven (7) additional names as unindicted co-conspirators.

[2] Group App. D contains the indictment, Group App. E contains the government's bill of particulars addressed to eleven (11) of the overt acts and Group App. F is the government's bill of particulars addressed to Overt Act 3.

[3] Overt Act 5 is not pertinent to this petition in that no evidence was introduced at trial as to the allegations contained therein.

three (3) meetings; on January 20 and January 23, 1974 Zizzo, Frank Zizzo, Eugene and John Phebus, John Decker, and George Riojas met at a restaurant. On the latter date Zizzo and Eugene Phebus again met in the late evening at the same restaurant.

*Overt Act 4* recited that Zizzo, George Riojas, James Lentini and unnamed others delivered television sets to Barbara Ladwig on January 18, 1974. The bill of particulars as to this overt act specified location, date, time and defendants present.

On December 6, 1976 defendants' jury trial commenced; it continued for twelve (12) days, and ended with one day of jury deliberations. Zizzo was convicted of conspiracy and on January 31, 1977 received a five (5) year sentence.[4]

The Court of Appeals reviewed Zizzo's contention that the evidence at trial was insufficient to support the jury's verdict. The Court found that Zizzo's conviction was supported by the testimony of Richard Biggerstaff, James Lentini and Edward McCabe, their testimony was in turn supported by the testimony of John Decker and Walter Somacki, Jr. Thus, we will briefly focus on their testimony as it may be relevant to this petition.

An unindicted co-conspirator and oft-convicted gentleman, *Richard Biggerstaff,* testified in support of overt act 3 of the indictment and related that he was at Clancey's Restaurant in the presence of John Decker, Eugene Phebus,

[4] As to the eleven (11) original defendants, nine (9) stood trial (John Decker and Carmen Hegman pled guilty prior to trial; Decker testified at trial for the government; Hegman did not testify) and six (6) were found guilty. Frank Zizzo and Jack Berbesque were acquitted by the jury; Danny Yaksich was discharged by the court at the close of the government's case.



Frank Zizzo, Anthony Zizzo and George Riojas. Biggerstaff stated that he sat down at the table next to Eugene Phebus and slipped money to him under the table so that the others present could not see. Anthony and Frank Zizzo and George Riojas left the restaurant in an automobile.[5]

As to Zizzo's second meeting in support of overt act 3 Biggerstaff testified that he, Eugene Phebus, George Riojas, Zizzo and Frank Zizzo were present at the same restaurant and once again he slipped some money under the table to Eugene Phebus so that the others could not see.

Over defense objection, Richard Biggerstaff was permitted to testify as to acts not mentioned in either the indictment or the bill of particulars. As they pertain to Zizzo, Biggerstaff stated that on or about January 28 or 29, 1974, a meeting was held at Clancey's. After this meeting Zizzo and two (2) other defendants, allegedly went to a town in Westville to pick up a load of televisions and loaded these televisions onto vans from trailers. This is the same occurrence as to which John Decker says Zizzo was not present and further, is not mentioned in either the indictment or the bill of particulars. On a second occasion, on or about the same date, Biggerstaff was again permitted to testify over objection that Zizzo and two (2) others loaded another fifty (50) television sets. According to Biggerstaff, he then picked up Zizzo and took him home.[6]

James Lentini, an unindicted co-conspirator and the principal witness against Zizzo, testified in support of overt

[5] John Decker, an accomplice and guilty-pleading co-defendant, testified he was present at this meeting but specifically stated that Anthony and Frank Zizzo were not present.

[6] Apparently the first crossloading took place at the same time as the second meeting at Clancey's Restaurant.

act 4. Lentini knew Zizzo well and they (Lentini and Zizzo) frequented a tavern where Lentini's niece, Barbara Ladwig, worked.

According to Lentini, he and Zizzo plotted to deliver televisions to Faye Campagna and, by and by, Lentini and Zizzo did so. Three (3) people watched this purported television delivery, Barbara Ladwig, Michelle Congles and Phillip Campagna. Barbara Ladwig and Phillip Campagna had earlier pled guilty to other charges relating to the distribution and/or possession of this same batch of stolen televisions. Additionally, Ladwig was an unindicted co-conspirator in the instant case. Michelle Congles was involved in the distribution of the instant televisions.

Ladwig, who presumably knew Zizzo from his visits to the restaurant where she worked, Congles and Campagna were called as witnesses by the government in an apparent effort to bolster Lentini's oft-contradicted testimony. Although all three (3) were present at the alleged delivery none of them identified Zizzo in court as being the man present with Lentini.

Lentini's testimony was also contradicted by his statement that after Barbara Ladwig paid him for the televisions he gave the money to Zizzo. Prior to trial Lentini told the FBI that a black man and not Zizzo, picked up the proceeds of the sale. Lentini went so far as to identify a photograph of this black man in the presence of the F.B.I.[7]

[7] Edward McCabe was the other witness against Zizzo mentioned in the Court of Appeal's decision. McCabe merely stated that another co-defendant had mentioned Zizzo's name in connection with some nefarious activity.



## REASONS FOR GRANTING THE WRIT

### I.

Fed.R.Crim.Proc., 7(f) concerns the government's filing of a bill of particulars. This case concerns the government's obligations to comply with a trial court's order to file a bill of particulars and the remedies available to an accused when the government is less than complete in fulfilling its obligations.

As to the function of the Fed.R.Crim.Proc., as they may relate to the administration of justice in the federal courts and considerations underlying the grant of a petition for certiorari, this Court held in *McNabb* v. *U.S.*, 318 U.S. 332 (1943) that:

> "The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, . . . this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . . And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance." (318 U.S. at 341; Cits. Omtd.; ft.nt. omtd.)

In the case at bar, the trial court, pursuant to Fed.R. Crim.Proc., 7(f), directed the government to file a bill of particulars. This case involves the question as to whether the government having filed a bill of particulars is bound by the particulars alleged.

In *U.S.* v. *Neff*, 212 F.2d 297 (3rd Cir., 1954) the Court reversed defendant's perjury conviction where the government introduced evidence not revealed in the government's bill of particulars. The Court held that:

> "Bills of particulars in criminal cases in federal courts are governed by Rule 7(f) of the Federal Rules of Criminal Procedure 18 U.S.C., which is substantially a restatement of well-settled principles. The latter established that a bill of particulars 'Once obtained * * * concludes the rights of all parties who are to be affected by it, and he who has furnished the bill of particulars under it, must be confined to the particulars he has specified, as closely and effectively as if they constituted essential allegations in a special declaration.' *Otherwise stated, a bill of particulars strictly limits the prosecution to proof within the area of the bill.*" (212 F.2d at 309, ft.nts, omit.).

Simply stated, the question before this Court is whether the government, having filed a bill of particulars, can then introduce matter outside both the bill of particulars, the indictment and overt acts contained therein, where such matter was in the government's possession prior to trial and where the matter by its very nature was related to that disclosed in the bill of particulars and was material evidence of Zizzo's guilt. Should the decision of the Court of Appeals be allowed to stand, a trial court's order directing the government to file a bill of particulars *would be meaningless*, for the trial court's failure to exclude evidence at trial outside the bill of particulars was condoned by the Court of Appeals. The Court of Appeals' decision provides no room for sanctioning the exclusion of evidence not included in the bill of particulars.

This case involved an indictment for conspiracy and twelve (12) overt acts were alleged in support of the indictment. Pursuant to defense motion, the trial court directed the government to file a bill of particulars as to each of the overt acts alleged by the government and specifically ordered the government to disclose the date, time, location and defendants present during the third (3) overt act. The government filed a bill of particulars ostensibly in compliance with the trial court's order.



Zizzo's alleged involvement in this conspiracy centered around overt acts three (3) and four (4). Overt Act 3 was apparently intended by the government to show some fourteen (14) meetings attended by all of the indicted and unindicted co-conspirators out of which the conspiratorial scheme was hatched. The bill of particulars disclosed that Zizzo attended three (3) of these alleged conspiratorial meetings.

Richard Biggerstaff, an unindicted co-conspirator, *interviewed by the government prior to trial*, supplied the testimonial basis in support of overt act 3.[8] Biggerstaff's testimony as to Zizzo's presence at three (3) of the alleged co-conspiratorial meetings is, in and of itself insufficient to establish conspiratorial guilt. Biggerstaff's testimony showed Zizzo was present but not that Zizzo had any knowledge of the conspiracy scheme. Yet Biggerstaff was permitted to testify *over objection* to material integrally related to the bill of particulars defining the overt act but that was not included in said bill of particulars. That is, Biggerstaff testified that after one of the meetings and on or about the occasion of the second meeting, Zizzo left the meeting with a couple of the other defendants and went to

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[8] Biggerstaff offered his testimony while in jail on another conviction and apparently did so with hopes of F.B.I. intercession in his various cases.

a certain location wherein he loaded stolen televisions from a truck to a van. Thus, Biggerstaff was able to supply evidence of Zizzo's knowledge of the purpose of this conspiracy by testifying that Zizzo twice loaded trucks and said evidence was not disclosed in advance of trial in the bill of particulars. The legal question becomes whether material evidence of defendant's guilt can be excluded from the bill of particulars whereby the nature of the particulars filed, such evidence, had it existed, should have been included.[9]

In *U.S.* v. *Flom,* 558 F.2d 1179 (5th Cir., 1977) the Court found it to be reversible error for the government to unambiguously state in its bill of particulars that it had no intention of introducing evidence of a contract and then later at trial introduce such evidence over defendant's objection. The *Flom* Court held that "whether the government had to file the bill (of particulars) or not, it chose to do so, and the defendants were entitled to rely on it until validly amended", 558 F.2d at 1185. Like *Flom,* the bill of particulars in the case at bar was not ambiguous.

The Court below held that there was no error in the exclusion of evidence admitted outside the bill of particulars because the trial court had ruled at trial that the government had given defendant requisite discovery and that the trial court's ruling in this regard was tenable (App. A, p. 4a). The Court of Appeals reached this ruling insofar as the government's compliance with discovery was concerned. However, the Court transferred this reasoning to the issue as to whether the government should

[9] It strains credibility that the government did not know prior to trial that Biggerstaff was going to testify that Zizzo and two (2) other defendants loaded trucks with stolen televisions on two (2) occasions.



have been precluded from introducing admittedly relevant evidence, that was under the umbrella of the overt act but not detailed in the bill of particulars.

Zizzo agrees that there is no requirement at a conspiracy trial that the evidence be limited to overt acts listed in the indictment; Zizzo agrees that the evidence complained of in this petition was relevant; Zizzo agrees that a bill of particulars does not entitle the defendant to be apprised of additional overt acts; and Zizzo agrees that whether or not a bill of particulars should have been granted is committed to the sound discretion of the trial court.[10]

The specific questions in the case at bar are not the questions posed above, but instead, whether the government can introduce material at trial that comes within the umbrella of an overt act and is not listed in the bill of particulars defining that act where such material was in the government's hand prior to trial and such evidence was highly relevant to defendant's guilt. If an ac-

[10] The Court of Appeals cited six (6) cases in support of its position that the exclusion of evidence admitted outside the overt acts and bill of particulars is not mandated; *Cook* v. *U. S.,* 354 F.2d 529, 531 (9th Cir., 1965); *U. S.* v. *Addonizio,* 451 F.2d 49 (3rd Cir., 1972); *U. S.* v. *Rimanich,* 422 F.2d 817 (7th Cir., 1970); *U. S.* v. *Wells,* 387 F.2d 807, 808 (7th Cir., 1967). Each of these cases addressed the question as to whether or not a bill of particulars should have been granted and not the question of introducing evidence outside the bills of particulars.

A close reading of *U. S.* v. *Bastone,* 526 F.2d 971, 987 (7th Cir., 1975) discloses that it has absolutely nothing to do with bills of particulars. Finally, the Court of Appeals' reliance on *U. S.* v. *Lacob,* 416 F.2d 756 (7th Cir., 1969) is misplaced for in *Lacob* the government's bill of particulars purported to be nothing more than a partial list and the defendant never asked for any specification.

cused cannot rely on the government's unambiguous answers in a bill of particulars what is the purpose of a bill of particulars being filed.

The court below recognized the principle that:

> "That if proof offered by the prosecution at a trial is at significant variance from the proof outlined in the indictment or the bill of particulars (if one is filed) and if that variance is prejudicial to the defendants, then the defendants have been denied a fair trial whether the government has complied with the trial court's discovery orders or not." (App. A, p. 8a)

Yet, if trial courts are to apply the same test to proof that varies from the indictment as to proof that varies from the bill of particulars what is the significance of the bill of particulars.

Zizzo urges that the issue of significant variance is clear. Zizzo relied on a bill of particulars that defined an overt act. The government introduced at trial evidence from an oft-contradicted source, that some three (3) years prior to trial Zizzo, at a certain location, twice loaded stolen televisions. Certainly, evidence within the umbrella of an overt act, highly incriminating to defendant, not included in the government's bill of particulars is at significant variance from the bill of particulars.

Secondly, the surprise to defendants is obvious. It concerns the insurmountable difficulties of rebutting government evidence that some three (3) years prior to trial, Zizzo and two (2) others, on two (2) separate occasions, loaded stolen televisions from a truck to a van. Could Zizzo investigate the scene, interview possible witnesses, investigate the vehicles involved and place his location on that date? The answer is no!



The harsh application of the "significant variance" rule places on defendants the burden of explaining the government's failure to comply with a discovery order.

This rule and its application has led to the court below and at least one other Circuit Court of Appeals warning the government against a gamemanship approach to a bill of particulars.

In the court below it was stated:

> "In closing this section of our order, we should like Government counsel to remember that discovery responsibilities are not satisfied by technical arguments that there was compliance with the trial court's discovery orders. To the contrary, regardless of whether the Government was in compliance with such orders, unless these defendants were fairly apprised of what they would have to defend against, proof of events not in the indictment or bill of particulars should have been excluded. See, *e.g., United States* v. *Armco Steel Corp.,* 255 F.Supp. 841 (C.D. Cal. 1966); see generally, *United States* v. *Lacob, supra.* Consequently, in criminal trials, the Government should do its best to inform defendants of the events it plans to prove even if there is no applicable discovery order. Otherwise, in future cases, a surprised defendant could make a better showing of prejudice and therefore obtain reversal of a conviction that would have been unavailable had the prosecutor taken time to provide all non-privileged information to him." (App. A, p. 9a)

In *U.S.* v. *Glaze,* 313 F.2d 737 (2nd Cir., 1963) it was stated:

> "We have observed that the Government, on occasion, objects to granting particulars even though no disadvantage to it can be ascertained. In so doing, it follows a policy which has gradually fallen into disfavor in our courts of criminal justice—that it should

reveal but the bare minimum of the elements of the offense charged so as to satisfy in the most cursory manner the requirement that the defendant be apprised of enough information to aid him in the preparation of his defense. We do not say that the Government need give away every aspect of its case, nor that it reveal its evidence. But we do say that a balance fair to both sides can be struck, by a conscientious endeavor to avoid surprise at trial. This in turn makes for a more expeditious trial. Although the Government's conduct did not result in substantial prejudice to the defendant in this case, we by no means wish to imply that affirmance constitutes condonation." (313 F.2d at 761)

The time has come for this Court to put teeth into Fed. R.Crim.Proc., 7(f). Zizzo respectfully urges that this Court grant the instant petition and reverse and remand the instant conviction for a new trial where the accused will not be in a position of detrimentally relying on an unfair and misleading government bill of particulars.

## II.

In this multi-defendant conspiracy trial the bulk of the testimony against the various defendants was provided by either guilty-pleading co-defendants, unindicted co-conspirators or others associated with either the distribution or reception of the stolen television sets. The testimony of these individuals was both inculpatory and exculpatory.

At the conclusion of the case the trial court instructed the jury as it may pertain to accomplice testimony as follows:

"An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of the participation in the



crime charged. *On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence.* However, the jury should keep in mind that such testimony is always to be received with caution and weighed with care.

"You should never convict a defendant upon the unsupported testimony of an alleged accomplice, *unless you believe that unsupported testimony beyond a reasonable doubt.*

"You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves." (Emphasis supplied)

This instruction given in trials where accomplice testimony is both exculpatory and inculpatory as to a particular defendant has been condemned by this Court. In *Cool* v. *U.S.*, 409 U.S. 101 (1972) this Court held that the third sentence of the above instruction that tells the jury that they may convict a defendant on accomplice testimony without any discussion of acquittal is fundamentally unfair, 409 U.S. at 103, n.4. This Court, in *Cool*, held that even if the accomplice testimony is inculpatory and exculpatory, it is error to tell the jury that they can convict on accomplice testimony but not acquit.

In *Cool* this Court also considered the portion of the accomplice instruction that states that before accomplice testimony can be considered by the jury they must believe this testimony beyond a reasonable doubt. Of course there is no objection to this instruction as long as it applies solely to inculpatory government testimony. However, its application to exculpatory accomplice testimony is, in this Court's view, reversible error. In *Cool* this Court held that the instruction is constitutionally defective in that it in-

hibits the jury's consideration of exculpatory accomplice testimony unless the jury makes a preliminary determination that the testimony is extremely reliable and further the instruction substantially reduces the government's burden of proof so as to require a defendant to establish his innocence beyond a reasonable doubt, 409 U.S. at 104.

In *U.S.* v. *Stulga,* 531 F.2d 1577 (6th Cir., 1976) the Court reversed certain conspiracy convictions in a trial remarkably similar to the trial of the case at bar. In *Stulga* twenty (20) witnesses testified for the government including two (2) major witnesses who were accomplices. As to the defendant in *Stulga* these witnesses' testimony was partially exculpatory. The *Stulga* Court, following this Court's decision in *Cool supra* reversed the conviction.

In Devitt and Blackmar, *Federal Jury Practice and Instruction Book,* §17.06 the "standard accomplice instruction" has been altered as follows:

> "An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, may be received in evidence and considered by the jury, even though not corroborated by other evidence, and given such weight as the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.
>
> "(You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.)"



The new accomplice instruction no longer tells the jury that they may convict on the basis of accomplice testimony. That sentence regarding conviction upon accomplice testimony was modified to reflect this Court's criticism in *Cool, supra,* and the criticism of the Court in *U.S.* v. *Armocida,* 515 F.2d 29, 47 (3rd Cir., 1975). Additionally, it can be seen that the new accomplice instruction draws parenthesis around the last paragraph and the drafters of this instruction suggest that in keeping with the *Stulga* decision, *supra,* the last paragraph should be omitted where accomplice's testimony is at least partially exculpatory, Devitt and Blackmar, Federal Jury Practice and Instruction Book, §17.06. In general, these changes reflect the modern view of Courts that the old accomplice instruction only applied in cases where the accomplice turned state's evidence and testified against the accused, see *Cool, supra,* at 409 U.S. at 103.

In the case at bar, the bulk of the evidence as to Zizzo was by accomplices. This evidence was both inculpatory and exculpatory.

James Lentini was the principal witness against Zizzo. Lentini testified that he had known Zizzo for a considerable period of time and had often ate and drank with Zizzo at a certain restaurant. It so happened that Lentini's niece waited on Lentini and Zizzo many times at this restaurant. By and by, Lentini stated that he and Zizzo were going to sell the televisions through Lentini's niece, Barbara Ladwig, and that they prepared a truck load of television sets and brought them to Barbara Ladwig's house. Also present and involved in the distribution scheme was Michelle Congles, Phil Campagna and Faye Campagna. Although

Barbara Ladwig, Michelle Congles and Phil Campagna were present when the televisions were delivered, none of these three (3) individuals could identify Zizzo in court.[11] Further, each of these individuals were arguably Zizzo's accomplices, see this Petition, pp. 7-8, *supra*.

Lentini's testimony as to Zizzo's involvement in this particular distribution was also contradicted by a prior statement that Lentini gave to the F.B.I. wherein Lentini stated that a black man and not Zizzo received the money for this distribution. In fact, Lentini went one step further and identified a photograph that the F.B.I. presented to him of a black man who Lentini claimed received the proceeds. All of this relates to overt act 4.

As to overt act 3 we have the testimony of Biggerstaff reproduced above. As to the first meeting at the restaurant Biggerstaff testified that John Decker was present. John Decker testified for the government at trial after pleading guilty and eventually received a four (4) year sentence. At this crucial conspiratorial meeting in which Decker admitted that he himself was present he specifically stated that Zizzo was not present.[12]

[11] The significance of this non-identification testimony formed a crucial part of Zizzo's closing argument:

"He said that during this delivery Anthony Zizzo came right into the house. Well, Barbara Ladwig, the waitress, was there. She had seen Anthony Zizzo, we don't know how many times, at the Highland Manor, waited on him; she said there was a short fat man with a beer belly. She didn't say Anthony Zizzo was the man that came into the house, like her uncle Lentini said.

Michelle Congles was there. They looked at Zizzo in the courtroom. She didn't say it was him. Ladwig didn't say it was him. Phil Campagna was there. He didn't come into the courtroom and say, "That's the man who came into the house." Just Lentini, at that juncture."



Thus, it is clear that by virtue of the accomplice instruction given to the jury Zizzo was deprived of the jury's consideration of obviously exculpatory defense evidence. Said evidence could not be considered by the jury, as per the instructions of the trial court unless they believed the evidence beyond a reasonable doubt. Further, the jury was informed that they could convict on the basis of accomplice testimony but could not acquit. Such an instruction in the case at bar is fundamentally unfair.

A not uncommon occurrence at multi-defendant conspiracy trials is that various individuals involved in the conspiracy (accomplices) testify for the government and then give testimony that is both exculpatory and inculpatory. There can be no question but that in the case at bar the accomplice instruction was appropriate at least to some of the government's testimony for some of the government-accomplice testimony was clearly inculpatory.

By way of plain error, Zizzo, in the court below, questioned the propriety of the trial court giving an accomplice instruction in the form reproduced above where at least some of the accomplice testimony was exculpatory as to

[12] The conflict between the testimony of Biggerstaff and Decker was also argued by defense counsel during closing argument and he stated:

"Now, you heard three witnesses, convicts, all trying to weasel out of their penitentiary terms, or cut them down. They certainly didn't corroborate each other. They didn't know each other? Don't buy that. They didn't corroborate each other, and not one of them was in any way, in any instance corroborated. As a matter of fact, Biggerstaff was contradicted by his partner, John Decker."

Zizzo. The court below did not agree. We urge this Court to grant the instant petition and reach an opposite conclusion.

## CONCLUSION

Wherefore, Petitioner, Anthony Zizzo, respectfully urges this Honorable Court to grant the instant petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit for the purpose of determining the questions herein presented. Should this Court see fit to grant this petition, Zizzo would urge that this Court reverse and remand this cause for a new trial wherein Zizzo will not be forced into a position of detrimentally relying on an unfair and misleading government bill of particulars and wherein Zizzo may present his defense before a fairly instructed jury.

Respectfully submitted,

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# APPENDIX

## GROUP APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued June 2, 1978

September 27, 1978

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

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Nos. 77-1149 thru 77-1151, 77-1161 thru
77-1164, 77-1185 and 77-1220

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

vs.

MICKEY MICHAEL, GEORGE RIOJAS, EUGENE PHEBUS, ANTHONY ZIZZO, JOHN PHEBUS and JOSEPH VAJNER,

*Defendants-Appellants.*

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Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
Nos. HCR 76-87, 88, 90 — Phil M. McNagny, Jr., Judge.

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## ORDER

This appeal is from judgments of conviction emanating from four separate indictments originally involving eleven defendants. Pursuant to Rule 13 of the Federal Rules of Criminal Procedure, the district court consolidated the four cases for trial.

On June 24, 1976, a grand jury indicted eleven individuals for conspiring to receive and dispose of 1400 stolen General Electric television sets, which had been transported from a Chicago railroad yard to Indiana, in violation of 18 U.S.C. § 2315. This was said to violate the general conspiracy statute (18 U.S.C. § 371). Twelve overt acts were set out in the conspiracy indictment. A second indictment charged Eugene Phebus with possessing 30 General Electric television sets that had been part of an interstate shipment, knowing they were stolen, in violation of 18 U.S.C. § 659. A third indictment charged Joseph Vajner and Mickey Michael with possessing 30 General Electric television sets, part of an interstate shipment, knowing they were stolen, also in violation of 18 U.S.C. § 659. A fourth indictment charged Joseph Vajner and Jack (Jacque) Berbesque with the possession of 40 General Electric television sets that were part of an interstate shipment, knowing they were stolen, again in violation of 18 U.S.C. § 659.

On November 4, 1976, the distict judge entered a voluminous order disposing of various pretrial motions, resulting in a six-page response by the Government including information as to all overt acts but the third. On November 24, he ordered the Government to disclose the date, time, location and defendants present during the third overt act[1] of

[1] The third overt act was as follows:

"From on or about the 15th day of January, 1974, through and including the 26th day of February, 1974, in the Northern District of Indiana, the [eleven conspiracy] defendants, Frank Zizzo, Anthony Zizzo, Eugene Phebus, George Riojas, John Phebus, Joseph Vajner, Jacque Berbesque, Danny Yaksich, Mickey Michael, Carmen Hegman and John Decker

(footnote continued on following page)



the conspiracy indictment "with as much specificity as is feasible" within five days. The Government complied by filing a four-page response.

Defendants Eugene Phebus and Joseph Vajner filed motions for severance in August 1976 with respect to the cases involving them. These motions were denied in the order of November 4, 1976, because Phebus had not shown actual prejudice and nothing contained in Vajner's motion convinced the court that he would be unable to obtain a fair trial.

Prior to the commencement of the trial on December 6, 1976, defendants John Decker and Carmen Hegman pled guilty to the conspiracy charge. At the close of the Government's case-in-chief on December 16, 1976, the court granted conspiracy defendant Danny Yaksich's motion for a directed verdict of acquittal.

At the close of the trial, appellants Mickey Michael, George Riojas, Anthony Zizzo, John Phebus, Eugene Phebus, and Joseph Vajner were found guilty of the conspiracy charged, while co-defendants Frank Zizzo and Jacque Berbesque were acquitted of that charge. Defendant Eugene Phebus was found guilty of the substantive offense charged against him in HCR 76-87. Defendants Joseph Vajner and Mickey Michael were also found guilty of the substantive offense charged against them in indictment HCR 76-88. Defendants Joseph Vajner and Jacque Berbesque were acquitted of the substantive charge against them in indictment HCR 76-89. The six convicted defendants were sentenced to varying terms of imprisonment; all have appealed. We affirm the convictions.

and unindicted co-conspirators Trice Eugene Morrill, Richard Biggerstaff, Walter Somacki, Jr., James Lentini, Barbara Ladwig, George Ratkovich and Anthony Sedita and others, held meetings to discuss receiving, concealing, selling and disposing of approximately fourteen hundred General Electric black and white and color television sets which were stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois."

The evidence showed that the television sets were transported from Chicago in railroad "piggy-back" semi-trailers to the P & H Equipment Company yard in Michigan City, Indiana, on the evening of January 12, 1974. During that night, 1400 General Electric television sets were crossloaded from the railroad semi-trailers to three Continental trailers parked in that yard. The evidence adduced by the Government was aimed at showing the involvement of the various defendants in the scheme to dispose of the television sets. This evidence will be discussed in some detail with respect to the various errors asserted by the six convicted defendants. For sake of brevity, there will be no summary of the voluminous evidence received.

*Government's Compliance with Discovery Orders*

Defendant's chief argument is that extensive evidence should have been excluded because the Government did not comply with the discovery orders of the district court. The short answer is that the trial judge himself was best equipped to rule whether his discovery orders were obeyed by the Government and he did so rule. We will not disturb his repeated statements that the Government had given defendants requisite discovery because his rulings were tenable. As his order of November 4 clearly indicates, he did not mean to order the Government to disclose all overt acts, including those not mentioned in the indictment (U.S. App. D footnote at 9). On this record, his finding of compliance with his discovery orders was not an abuse of discretion.

On October 28, 1976, the Government filed a discovery report stating that it would provide defendants with confessions, oral statements to government agents, recorded grand jury testimony and reports of physical or mental examinations and of scientific tests or experiments. The discovery report said that the defendants would be permitted to inspect or copy any of their tangible property within the Government's control and that the Government would provide them with copies of their prior criminal records and a list of searches and seizures resulting in the acquisition of trial exhibits. This discovery report also stated that defendants would be permitted to inspect or copy all physical evidence obtained from defendants and unindicted co-conspirators[2] which the Government might introduce into evidence, and that the Government was aware of its responsibility to disclose to defendants "any additional material discovered by the Government or inadvertently excluded * * *." In closing, the discovery report stated that the Government recognized its responsibility to provide defendants with exculpatory materials and favorable evidence and that the Government would fulfill this responsibility. On October 29, the Government provided defense counsel with copies of the materials described in the report of discovery (see U.S. Br. 24).



In its lengthy November 4 order disposing of defendants' pretrial motions, the district court noted how the Government planned to comply with the discovery motions. As to Eugene Phebus' discovery motion, the court ordered the Government to prepare "a list by description of documents it plans to introduce at trial by November 29, 1976" and to make the list available to each defendant. In the same order the court ruled what materials were not discoverable under Rule 16 of the Federal Rules of Criminal Procedure. The court also ordered the Government to make all exculpatory material available to the defendants by November 19. The court granted the defendants' request for production or inspection of any documents relating to the identification of the stolen television sets and to provide each defendant with a copy of his grand jury statements. The Government was ordered to set forth "with as much specificity as possible the time, date, the approximate location, and the defendants present" as to each of the twelve overt acts alleged in the conspiracy indictment. In addition, the court ordered the Government to furnish defendants with a descriptive list of the documents it planned to introduce at the trial.

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[2] The conspiracy indictment named seven individuals as unindicted co-conspirators.

On November 8, 1976, the Government sent defense counsel copies of all documents which it intended to introduce into evidence and referred defendants to nine related criminal cases involving different defendants.[3] The Government informed defendants that in two of those nine cases transcripts were available, that unindicted co-conspirator Herbert Ralph Patterson's deposition was available to counsel, and that additional exhibits could be inspected by defense counsel at the prosecutor's office during the week of November 22.

On November 19, 1976, the Government filed a six-page response with respect to information regarding eleven of the twelve overt acts. However, the Government indicated that it needed clarification with respect to court-ordered information as to the third overt act (note 1 *supra*), causing the court on November 24 to direct the Government to disclose that information "with as much specificity as is feasible." Consequently, on November 29, the Government filed a four-page response with respect to the third overt act. This response listed 14 meetings between January 15 and January 2, 1974, including, except in three "unknown" instances, the times of the meetings. The location of each meeting was given as well as the names of the defendants present. The response also named the seven unindicted co-conspirators as present at some of these meetings, which were held in the Northern District of Indiana, to discuss the disposition of the 1400 stolen television sets. While the last of the 14 meetings described occurred on or about January 23, the response showed that the third overt act lasted

[3] The court agreed with the Government that only prior related cases were covered by its discovery order (see Tr. 667-668; cf. U.S. App. D at 8), so that the Government was not required to advise defendants of a then recent indictment (under 18 U.S.C. § 659) of otherwise unindicted co-conspirator Richard Biggerstaff for his possession of some of the stolen television sets. Defendants knew of the charges against Biggerstaff before he testified as a Government witness, and during his direct examination by the Government he was examined as to that indictment. No prejudice to defendants has been shown with respect to this matter.



until February 26. The district judge considered that the response was as specific as feasible. No more was required by the November 24 order.

While the Government did not choose the "open file" method of discovery observed by some United States Attorneys, the Federal Rules of Criminal Procedure do not go that far. At the oral argument and on brief, the Government's representatives in this case have told us that the "open file" procedure would have jeopardized the safety of various œovernment witnesses. In any event, such substantial discovery was provided that this Court cannot say the trial court abused its discretion in not requiring more. See, *e.g., United States* v. *Calhoun,* 510 F.2d 861 (7th Cir. 1975).

*Evidence Admitted Outside the Twelve Overt Acts*

As seen, the Government satisfied the trial judge that it had adequately complied with his discovery orders as to the twelve overt acts listed in the conspiracy indictment, and we are unpersuaded that this conclusion was erroneous. Defendants net complain that no evidence should have been received with respect to unlistd overt acts. However, there is no requirement that the evidence at a conspiracy trial be confined to the overt acts spelled out in the indictment. *United States* v. *Bastone,* 526 F.2d 971, 987 (7th Cir. 1975), certiorari denied, 425 U.S. 973.[4] Furthermore, the evidence about which defendants complain was so clearly related to the broad conspiracy charged that it was plainly admissible.

[4] Among others, defendant John Phebus asserts that tthe Government's cahse against him fatally differed from its bill of particulars. But he did not move for a bill of particulars (see Govt. App. D) nor, strictly speaking, did the Government file one (see Govt. App C, F and G). In any event, a motion for a bill of particulars does not entitle defendants to be apprised of additional overt acts. *Cook* v. *United States,* 354 F.2d 529, 531 (9th Cir. 1965); see *United States* v. *Addonizio,* 451 F.2d 49 (3d Cir. 1972), certiorari denied, 405 U.S. 935; *United States* v. *Rimanich,* 422 F.2d 817 (7th Cir. 1970); *United States* v. *Wells,* 387 F.2d 807, 808 (7th Cir. 1967), certiorari denied, 390 U.S. 1017.

None of the challenged evidence was necessarily part of the tewelve overt acts for which discovery was ordered. Therefore, it was admissible even though not included in the Government's response to the discovery orders. In view of the very general nature of that offense, namely, an unlawful agreement extending over four months and involving eleven defendants and seven others to dispose of 1400 stolen General Electric television sets, it would be an impossible burden to require the Government to advise defendants in advance of every piece of evidence that might be adduced during the nine days of the Government's case-in-chief, with 29 Government witnesses being heard. Of course, the Government may not shirk its responsibility to provide each defendant with enough information for a fair trial. But these defendants were sufficiently apprised, and the admitted evidence was so connected with th discovery material that the claims of surprise ring hollow.[5]

It is true that if proof offered by the prosecution at a trial is at significant variance from the proof outlined in the indictment or the bill of particulars (if one is filed) and if that variance is prejudicial to the defendants, then the defendants have been denied a fair trial whether the Government has complied with the trial court's discovery orders or not. See generally, *United States* v. *Lacob*, 416 F.2d 757 (7th Cir. 1969), certiorari denied, 396 U.S. 1059. The key question then is whether such a variance is prejudicial to defendants. In this case neither their briefs nor oral argument show that there was a basis on this record to argue substantial prejudice.

First of all, at least some of the evidence was with respect to events of which the defendants should have been on

[5] We cannot "buy" defense counsel's assertion of surprise about testimony concerning Vajner's Hobart, Indiana, residence and garage, for photographs of that location had been exhibited to them by Government Counsel (Michael Br. 16), thus putting defendants on notice that Hobart would be involved. Compare *United States* v. *Horton*, 526 F.2d 884, 887 (5th Cir. 1976), certiorari denied, 429 U.S. 820.



notice. See., *e.g.*, note 5 supra. Second, defendants have been unable to show what impeaching evidence they would have offered if they had known earlier that any added incidents would be proven at the trial. See generally *United States* v. *Addonizio*, 451 F.2d 49, 65 (3d Cir. 1972), certiorari denied, 405 U.S. 935. Third, even apart from these "new" events, there was adequate evidence about which the defendants were properly warned in advance. For example, defendant Michael was apparently covered by the seventh overt act, even though co-defendant Yaksich was dismissed from the case because of a failure to have proof on that "count" as to him.

In sum, we cannot fault the trial judge for these evidentiary rulings. They were "to the end that the truth may be ascertained" (Rule 102 of the Federal Rules of Evidence). Since defendants have not shown that the complained-of evidence was irrelevant or otherwise inadmissible, its receipt was proper. See Rule 402 of the Federal Rules of Evidence.

In closing this section of our order, we should like Government counsel to remember that discovery responsibilities are not satisfied by technical arguments that there was compliance with the trial court's discovery orders. To the contrary, regardless of whether the Government was in compliance with such orders unless these defendants were fairly apprised of what they would have to defend against, proof of events not in the indictment or bill of particulars should have been excluded. See, *e.g.*, *United States* v. *Armco Steel Corp.*, 255 F.Supp. 841 (C.D. Cal. 1966); see generally, *United States* v. *Lacob*, *supra*. Consequently, in criminal trials, the Government should do its best to inform defendants of the events it plans to prove even if there is no applicable discovery order. Otherwise, in future cases, a surprised defendant could make a better showing of prejudice and therefore obtain reversal of a conviction that would have been unavailable had the prosecutor taken time to provide all non-privileged information to him.

*Admissibility of "Lock-seal" Reports*

Some of the defendants question the receipt of Government Exhibits 15 and 16, which indicate the date, time and condition of lock-seals on the piggy-back trailers when they left the Chicago railroad yard on January 12, 1974. There was no objection to Government Exhibit 14, which was the first of the lock-seal reports. The objection as to the latter two was because defense counsel had not been furnished copies of them prior to December 7, the second day of trial. The Government explained that it did not receive those two exhibits until December 5 or 6 and was not aware of their existence until they had been turned over by a railroad employee at a pretrial conference. On the basis of no showing of prejudice the district court properly ruled them admissible. They were not prejudicial because other testimony and documents established the identity, shipment and value of the television sets in question.

*Admissibility of Donald's Pavic's Check*

Defendant Michael contends that a check written by Government witness Donald Pavic, which he gave to Michael as payment for a television set which Pavic purchased from Michael on January 20, 1974, should not have been received in evidence because it too was not identified before trial. However, the Government did not know of the television set in question until it was obtained from Pavic's residence on December 6, the first day of trial. Only afterwards did the Government receive Exhibit 25, the check about which defendant Michael complains.

Defendants learned of the check when unindicted co-conspirator Richard Biggerstaff identified it on the basis of his endorsement during his December 9 testimony (Tr. 816) and it was then shown to defense counsel (Tr. 1167). On December 13, counsel for Michael objected to its admission. Since the Government had not received the check until a few days prior to December 13 and it had been identified in court and shown to opposing counsel on December 9, the



objection was overruled. This ruling was permissible for no prejudice was shown in that the essence of the Government's case was not based on this transaction.

*Alleged Cumulative Error*

Defendant Michael contends that the prior alleged errors of the court cumulatively denied him due process of law. However, as seen, in our view the trial court's evidentiary rulings were not erroneous and certainly did not constitute reversible error. Furthermore, the unassailed evidence received against him and the other appellants was devastating, so that there has been no showing of any substantial prejudice from the court's receipt of the evidence under attack.

*Admissibility of Government Exhibit 45*

Defendant Eugene Phebus states that the trial court erred in permitting the admission of Government Exhibit 45, an advice of rights form which Phebus testified contained his signature. Exhibit 45 was offered into evidence by the Government to compare Phebus' signature thereon with Government Exhibit 37, a check written by unindicted co-conspirator Walter Somacki, Jr. to pay for television sets purchased from defendant Michael. This check bore a second endorsement by "Eugene Phebus" which he denied he had written. Exhibit 45 was properly admitted as a handwriting exemplar for jury comparison with Phebus' signature on Exhibit 37. See Rule 901(b)(3) of the Federal Rules of Evidence and 28 U.S.C. § 1731.

*Admissibility of Edward McCabe's and James Lentini's Testimony*

Defendant Riojas asserts that testimony of Edward McCabe and unindicted co-conspirator James Lentini should not have been received. But it was not covered in the twelve overt acts and therefore was not required to be disclosed in advance of trial. Since this evidence concerned the object

of the conspiracy it was admissible even though the described overt acts were not charged in the indictment. *United States* v. *Bastone, supra.* Similarly, it was permissible for Judge McNagny to refuse to require the Government to disclose the identity of these and other witnesses. *United States* v. *Jackson,* 508 F.2d 1001 (7th Cir. 1975).

*John Phebus' Attack on James Lentini's Testimony*

Although John Phebus' counsel did not object initially to unindicted co-conspirator James Lentini's testimony concerning his past relationship with John and Eugene Phebus, he now contends that there was no testimony by any witness that the television sets obtained by defendants Anthony Zizzo and George Riojas and then given to Lentini came from either Eugene or John Phebus. Other testimony did show that the television sets which had been delivered through Lentini were some of the stolen television sets originally delivered to Eugene and John Phebus at the P & H Equipment Company in Michigan City, Indiana. Therefore, the present contention is without merit.

*Cross-Examination of Witness Biggerstaff as to Prior Marriages*

John Phebus' counsel urges that he should have been permitted to cross-examine Government witness Richard Biggerstaff with respect to his marital relationships or at least his third marriage. However, defendants were permitted to go to great lengths in questioning Biggerstaff with respect to his motives and credibility, including reference to his past marriages and including reference to the theory of revenge that would have been raised by reference to the third marriage. Therefore, Judge McNagny was acting well within his discretion in refusing cross-examination with respect to Biggerstaff's third wife. *United States* v. *Harris,* 542 F. 2d 1283 (7th Cir. 1976), certiorari denied, 430 U.S. 934.



*Instruction About Interstate Character of the Stolen Property*

At the conclusion of the trial, the court instructed the jury:

> "Another of the essential elements in the crimes charged in the indictment is: The defendants' knowledge that the goods possessed were stolen. However, it is not necessary that the Government prove that the defendants knew that the property was stolen from an interstate shipment. It is sufficient if they knew that the property was stolen."

Defendant Vajner argues that with respect to the conspiracy indictment, the Government must prove knowledge that the stolen goods were in interstate commerce, so that the instruction was erroneous. We have previously rejected the identical argument in *United States* v. *Polesti,* 489 F.2d 822 (7th Cir. 1973), certiorari denied, 420 U.S. 990; to the same effect see *United States* v. *Roselli,* 432 F.2d 879 (9th Cir. 1970), certiorari denied, 401 U.S. 924. See also *United States* v. *Feola,* 420 U.S. 671.

*Instructions on Inferences from Possession of Recently Stolen Property and on Right of a Defendant not to Testify*

The complained-of instruction on permissible inferences to draw from the unexplained possession of recently stolen property was approved in *Barnes* v. *United States,* 412 U.S. 843, and was warranted here. The instruction on the right of the defendant not to testify was not a prejudicial comment on defendant Vajner's failure to testify, as also held in Barnes (at p. 845) and *Lakeside* v. *Oregon,* 46 LW 4248, 4250.

*Multiple Conspiracy Argument*

Defendant Vajner asserts that the evidence proved multiple conspiracies rather than the single conspiracy charged in the indictment, so that there was a fatal variance. Our review of the evidence satisfies us that Vajner participated

in the common goal of the other conspirators, so that he was not entitled to a multiple conspiracy instruction. *United States* v. *Crouch,* 528 F.2d 625 (7th Cir. 1976),[6] certiorari denied, 429 U.S. 900. The fact that he did not know or meet all of the other conspirators does not negate his participation in the conspiracy. See *United States* v. *Bastone, supra,* 526 F.2d at 981.

*Accomplice Instruction*

Defendants Anthony Zizzo and George Riojas assert that the trial court committed error in instructing the jury with respect to testimony of accomplice witnesses. They allege that the testimony of three "accomplices"—Government witnesses Congales, Ladwig and Campagna—was so exculpatory that the trial judge *sua sponte* should have recognized that the usual accomplice instruction, which assumes inculpatory testimony, would be confusing to the jury and therefore should have been modified. This creative argument fails for two reasons. First, as to Congales and Campagna, it cannot be assumed that the jury was likely to view them as accomplices. Second, and more significant, the testimony of Richard Biggerstaff and James Lentini indicating Zizzo's and Riojas' involvement was not exculpatory, nor was the corroborating testimony of witnesses Congales, Ladwig and Campagna exculpatory in this context just because they were unable to identify these two defendants in court. The witnesses admitted that they had little opportunity to view the defendants and instead inculpated them on other grounds. Surely under such circumstances the giving of the accepted accomplice instruction was not plain error. See *United States* v. *Vigi,* 515 F.2d 290 (6th Cir. 1975), certiorari denied, 423 U.S. 912.

*Severance Motions*

Defendants Eugene Phebus and Joseph Vajner contend that their severance motions should have been granted be-

[6] Similarly, defendant Eugene Phebus has not set forth any evidence that would require finding of a multiple conspiracy.



cause there were multiple conspiracies. As noted, the evidence did not establish multiple conspiracies. In addition, Vajner claims that because of the denial of his severance motion he was unable to call co-defendants to the stand. This is an insufficient reason where, as here, there was no showing that co-defendants would have testified or that their testimony would have benefited Vajner. Therefore, it was unnecessary to grant him a severance. *United States* v. *Hutul,* 416 F.2d 607 (7th Cir. 1969), certiorari denied, 397 U.S. 1012; *Byrd* v. *Wainwright,* 428 F.2d 1017 (5th Cir. 1970). The denial of these severance motions does not constitute an abuse of the wide discretion afforded the district judge on this issue. See *United States* v. *Alpern,* 564 F.2d 755 (7th Cir. 1977).

*Alleged Prejudicial Effect of Testimony of Richard Biggerstaff and John Decker*

Defendant Eugene Phebus contends that the Government misled the defendants and the court by permitting co-defendant John Decker and unindicted co-conspirator Richard Biggerstaff to testify inaccurately in answer to various questions about a December 4 pretrial conference with Government counsel, including whether the other man present and whether the two men discussed their testimony. The record shows that Biggerstaff was interrogated in the United States Attorney's office on December 4 about 10:45 a.m. John Decker arrived three and one-half hours later and remained until 9:30 p.m. This was not hidden from defense counsel, for FBI Agent Freas testified:

> "There were times, there were occasions when either of the gentlemen would agree or disagree with something the other may have said. On those instances, the two may have engaged in conversation to, I believe, in their own mind, accurately determine events as they transpired." (Tr. 2349)

The same matter was covered, probably to defendants' advantage, in closing argument. While in restrospect the Government's conduct as to this testimony may have been re-

grettable, it does not constitute reversible error. First, the defendants were not prejudiced since the error was eventually corrected and they were thereby provided with an added opportunity to attack the credibility of the two witnesses. We are convinced that more prompt correction of any inaccuracies would not have affected the verdict in this case. *Gigilo* v. *United States,* 405 U.S. 150. Second, while defendants have a reasonable argument that several items of the testimony might have been misleading, our reading of the context of the statements in the transcript reveal that there were no indisputably false statements, so that the prosecutors' inaction does not appear to have been deliberate. Compare *United States* v. *Pfingst,* 490 F.2d 262 (2d Cir. 1973), certiorari denied, 417 U.S. 919. Neither Decker nor Biggerstaff was asked about the presence of each other during the December 4 interview. Decker's statement that he did not discuss his testimony with Biggerstaff may simply mean he understood the question to deal with the court's *ad limine* order for a separation of witnesses at the trial rather than a more general discussion of the events that took place at the December 4 meeting.

*Sufficiency of Evidence as to Eugene Phebus, Anthony Zizzo and George Riojas*

While Eugene Phebus has pointed out certain discrepancies and inconsistencies in the testimony of Biggerstaff and Decker, the jury obviously decided that Biggerstaff's testimony was credible, as well as the corroborating testimony of Walter Somacki, Jr., Edward McCabe and Ray Pace. Such issues of credibility are a matter for the jury (*United States* v. *Martin,* 526 F.2d 485, 486 (10th Cir. 1975)), and there was ample testimony from witnesses other than Biggerstaff and Decker that Eugene Phebus was the original receiver and distributor of the television sets.

As to George Riojas and Anthony Zizzo, a review of the testimony of Richard Biggerstaff, James Lentini and Edward McCabe implicates both in the offenses charged. Furthermore, their testimony was supported by John Decker, Walter Somaski, Jr. and circumstantial evidence.



*McCabe's Narcotics Transaction*

Government witness McCabe testified that he had not used drugs since August 13, 1975. After the Government's case-in-chief had been closed, defendant Riojas attempted to elicit from James Romano a conversation he had with McCabe about narcotics six or seven weeks beforehand. Riojas contends that this hearsay evidence should have been received under Rule 801(d)(2) of the Federal Rules of Evidence[7] but none of the five requirements of that Rule has been satisfied, nor has Rule 804(b)(3) dealing with statements against interest. Judge McNagny had already permitted detailed cross-examination concerning McCabe's use of narcotics, so that we cannot say he abused his discretion in excluding this particular hearsay.

In addition, plaintiff wished to show that Romano saw McCabe go up to three known heroin users and observe that they were talking and that an exchange took place between them and McCabe. Since it is the fact that he approached them and had a conversation, rather than the actual statements made in the conversation, that would have been offered, no hearsay was involved in this respect.

Still, the evidence was properly excluded because it constituted an attempt to use extrinsic evidence to attack the credibility of a witness. As noted, there had been detailed cross-examination concerning McCabe's use of narcotics, and particularly in this context the defendants had no right to impeach a witness' credibility with extrinsic evidence. If the federal Rules of Evidence do not preclude such proof entirely (see Rule 608), they at least give the trial judge considerable discretion to exclude such evidence. See *United States* v. *Dinitz,* 538 F.2d 1214, 1224 (5th Cir. 1976), certiorari denied, 429 U.S. 1104; see also *United States* v. *Whiting,* 311 F.2d 191 (4th Cir. 1962), certiorari denied, 372 U.S. 935.

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[7] Rule 801(d)(2) provides that admissions by a party opponent are not hearsay in any of five situations, all inapplicable here.

*Inconsistency of Jury's Verdicts*

Defendant Joseph Vajner contends that the jury inconsistently found him guilty under the third indictment (HCR 76-88) and not guilty under the fourth indictment (HCR 76-89). The third indictment involved 30 television sets and Mickey Michael was also found guilty in that case. In the fourth indictment, Jacque Berbesque was the co-defendant and found not guilty with respect to 40 television sets. There was no inconsistence in the jury's finding Michael and Vajner guilty in the third case because a different co-defendant was involved in the fourth indictment and, like Vajner, was found innocent of that offense and because different evidence and a different time were involved. As was its prerogative, the jury just found the evidence too thin in the fourth case.

*Rebuttal Testimony*

Counsel for Eugene Phebus asserts that the Government should not have been permitted to introduce rebuttal testimony of Ray Pace and FBI Agent McFall. In his testimony, defendant Eugene Phebus had denied any involvement in the television set transactions. Consequently, the district court permitted Ray Pace to testify that he bought 15 television sets from Eugene Phebus for $150 each, which he sold to the Skyway Motel. McFall testified that he examined twelve such television sets at the Skyway Motel and their serial numbers matched the ones stolen from the Chicago railroad yard on January 12, 1974. It was plainly permissible for the Government to introduce such rebuttal evidence. *E.g., United States* v. *Wallace,* 468 F.2d 571, 572 (4th Cir. 1972). Since the Government is not shown to have had any Section 3500 material relating to Pace, defendant Eugene Phebus' present claim to such material is baseless. Compare *United States* v. *Paroutian,* 319 F.2d 661, 664 (2d Cir. 1963), certiorari denied, 375 U.S. 981.



*Prejudicial Publicity*

Defendant Riojas asserts that the district court erred with respect to the jurors' exposure to trial publicity. When this matter was brought up on the morning of December 9, the judge asked whether they had been exposed to two December 8 supposedly prejudicial *Hammond Times* articles. Two jurors indicated that they had been so exposed but were not influenced thereby. In view of the frequent admonitions concerning publicity by the trial judge, his interrogation was sufficient (*United States* v. *Solomon,* 422 F.2d 1110, 1119 (7th Cir. 1970), certiorari denied, 399 U.S. 911), especially since the only inflammatory material concerned Frank Zizzo who was subsequently acquitted by the jury.

Judgments of conviction affirmed.[8]

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[8] Other matters raised by defendants have been considered but found wanting and undeserving of discussion.

## GROUP APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 26, 1978

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

No. 77-1163

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

vs.

ANTHONY ZIZZO,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. HCR 76-90 — Phil M. McNagny, Judge.

### ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendant-appellant Anthony Zizzo, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.



## GROUP APPENDIX C

18 § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

## GROUP APPENDIX D

UNITED STATES DISTRICT COURT
For The Northern District Of Indiana
Hammond Division

UNITED STATES OF AMERICA

vs.

FRANK ZIZZO, ANTHONY ZIZZO, EUGENE PHEBUS, GEORGE RIOJAS, JOHN PHEBUS, JOSEPH VAJNER, JACQUE BERBESQUE, DANNY YAKSICH, MICKEY MICHAEL, CARMEN HEGMAN and JOHN DECKER,

Hammond Criminal No. H CR 76-90

The Grand Jury charges:

From on or about the 1st day of December, 1973, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the date of this indictment, in the Northern District of Indiana and elsewhere, the defendants, Frank Zizzo, Anthony Zizzo, Eugene Phebus, George Riojas, John Phebus, Joseph Vajner, Jacque Berbesque, Danny Yaksich, Mickey Michael, Carmen Hegman and John Decker did unlawfully, knowingly and willfully conspire, combine, confederate and agree together with each other and Trice Eugene Morrill, Richard Biggerstaff, Walter Somacki, Jr., James Lentini, Barbara Ladwig, Geroge (sic) Ratkovich and Anthony Sedita named as co-conspirators but not as defendants herein, and with divers other persons whose names are to the Grand Jury unknown, to commit the following offenses against the United States, to wit: To receive, conceal, store, barter, sell and dispose of approximately one thousand four hundred (1,400) General Electric black and white and color television sets with a value of more than five thousand dollars ($5,000) which had been embezzled and stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois, and moved as and transported in interstate commerce from the State of Illinois to the State of Indiana, knowing the same to have been stolen, in violation of Section 2315 of Title 18 of the United States Code.

*Overt Acts*

In furtherance of said conspiracy and to effect the objects thereof: the defendants, Frank Zizzo, Anthony Zizzo, Eugene Phebus, George Riojas, John Phebus, Joseph Vajner, Jacque Berbesque, Danny Yaksich, Mickey Michael, Carmen Hegman and John Decker and unindicted co-conspirators and others unknown to the Grand Jury, committed the following overt acts:

1. On or about the 12th day of January, 1974, in the Northern District of Indiana, Frank Zizzo, Eugene Phebus,



John Phebus, John Decker and Richard Biggerstaff and others, met at the P & H Equipment Company at Michigan City, Indiana to receive and conceal approximately fourteen hundred General Electric black and white and color television sets which had been stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

2. On or about the 12th day of January, 1974, in the Northern District of Indiana, Eugene Phebus, John Phebus, John Decker and Richard Biggerstaff and others cross-loaded approximately fourteen hundred General Electric black and white and color television sets from three trailers stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois, into three trailers owned by Continental Contract Carriers, which were located at the P & H Equipment Company in Michigan City, Indiana.

3. From on or about the 15th day of January, 1974, through and including the 26th day of February, 1974, in the Northern District of Indiana, the defendants, Frank Zizzo, Anthony Zizzo, Eugene Phebus, George Riojas, John Phebus, Joseph Vajner, Jacque Berbesque, Danny Yaksich, Mickey Michael, Carmen Hegman and John Decker and unindicted co-conspirators Trice Eugene Morrill, Richard Biggerstaff, Walter Somacki, Jr., James Lentini, Barbara Ladwig, George Ratkovich and Anthony Sedita and others, held meetings to discuss receiving, concealing, selling and disposing of approximately fourteen hundred General Electric black and white and color television sets which were stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

4. On or about the 18th day of January, 1974, Anthony Zizzo, George Riojas, James Lentini and others, delivered a quantity of General Electric color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois, to Barbara Ladwig at Hammond, Indiana.

5. From on or about the 20th day of January, 1974, to and including the 30th day of January, 1974, defendant, Carmen Hegman received and concealed on behalf of Anthony Zizzo, James Lentini, George Riojas and others, a quantity of General Electric black and white and color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

6. On or about the 19th day of January, 1974, defendant, Joseph Vajner, rented an Econoline Van from Airways Rental Company at Gary, Indiana for the purpose of transporting, distributing and facilitating the sale of quantities of General Electric black and white and color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

7. From on or about the 19th day of January, 1974, through and including the 29th day of January, 1974, defendant, Danny Yaksich, received and concealed on behalf of Joseph Vajner, Mickey Michael, Walter Somacki, Jr., Richard Biggerstaff and others, a quantity of General Electric black and white and color televison sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

8. From on or about the 19th day of January, 1974, through and including the 29th day of January, 1974, defendant, Joseph Vajner, and others delivered a quantity of General Electric black and white and color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois to George Ratkovich at Gary, Indiana.

9. On or about the 20th day of January, 1974, Joseph Vajner, Mickey Michael and Richard Biggerstaff delivered a quantity of General Electric color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois to Walter Somacki, Jr., at Gary, Indiana.



10. On or about the 28th day of January, 1974, unindicted co-conspirator Trice Eugene Morrill rented a GMC truck from Marcus Auto Leasing Corporation at Highland, Indiana for the purpose of transporting, distributing and facilitating the sale of a quantity of General Electric black and white and color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

11. On or about the 30th day of January, 1974, Trice Eugene Morrill and others delivered approximately forty-six General Electric color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois to Anthony Sedita at Merrillville, Indiana.

12. During February, 1974, Herbert Ralph Patterson received from and repaired for Joseph Vajner, Jacque Berbesque, George Ratkovich and others, a quantity of General Electric color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

All in violation of Title 18, United States Code, Section 371.

A True Bill:
/s/ Don E. Fuller
Foreman

John R. Wilks
United States Attorney
/s/ Fred W. Grady
By: Fred W. Grady
Assistant United States Attorney

## GROUP APPENDIX E

UNITED STATES DISTRICT COURT
For The Northern District Of Indiana
Hammond Division

UNITED STATES OF AMERICA

vs.

FRANK ZIZZO, ANTHONY ZIZZO, EUGENE PHEBUS, GEORGE RIOJAS, JOHN PHEBUS, JOSEPH VAJNER, JACQUE BERBESQUE, DANNY YAKSICH, MICKEY MICHAEL, CARMEN HEGMAN and JOHN DECKER.

Hammond Criminal No. H CR 76-90

*Government's Response To Court's Order Of Discovery*

Comes now the United States of America by its attorney, John R. Wilks, United States Attorney for the Northern District of Indiana, and in response to the Court's written order of November 4, 1976, directing the government to set forth the time, date and approximate location and identification of defendants present as to each overt act listed in the indictment filed under the above-captioned cause on June 24, 1976, the following information is provided:

1. On or about the 12th of January, 1974, in the Northern District of Indiana, Frank Zizzo, Eugene Phebus, John Phebus, John Decker and Richard Biggerstaff and others, met at the P & H Equipment Company at Michigan City, Indiana to receive and conceal approximately fourteen hundred General Electric black and white and color television



sets which had been stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

(a) Date: January 12, 1974
(b) Time: Approximately 9:00 P.M.
(c) Location: East U.S. 20, Michigan City, Indiana
(d) Defendants present: Frank Zizzo, Eugene Phebus, John Phebus and John Decker

2. On or about the 12th day of January, 1974, in the Northern District of Indiana, Eugene Phebus, John Phebus, John Decker and Richard Biggerstaff and others crossloaded approximately fourteen hundred General Electric black and white and color television sets from three trailers stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois, into three trailers owned by Continental Contract Carriers, which were located at the P & H Equipment Company in Michigan City, Indiana.

(a) Date: January 12, 1974 and January 13, 1974
(b) Time: Approximately 10:00 P.M. to 1:00 A.M.
(c) Location: East U.S.20, Michigan City, Indiana
(d) Defendants present: Eugene Phebus, John Phebus and John Decker

3. From on or about the 15th day of January, 1974, through and including the 26th day of February, 1974, in the Northern District of Indiana, the defendants, Frank Zizzo, Anthony Zizzo, Eugene Phebus, George Riojas, John Phebus, Joseph Vajner, Jacque Berbesque, Danny Yaksich, Mickey Michael, Carmen Hegman and John Decker and unindicted co-conspirators Trice Eugene Morrill, Richard Biggerstaff, Walter Somacki, Jr., James Lentini, Barbara Ladwig, George Ratkovich and Anthony Sedita and others, held meetings to discuss receiving, concealing, selling and disposing of approximately fourteen hundred General Electric black and white and color television sets which were stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

See government's Motion for Clarafication (sic) and Reconsideration

4. On or about the 18th day of January, 1974, Anthony Zizzo, George Riojas, James Lentini and others, delivered a quantity of General Electric color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois, to Barbara Ladwig at Hammond, Indiana.

(a) Date: On or about January 18, 1974
(b) Time: Approximately 10:00 P.M.
(c) Location: 7547 Alexander Street, Hammond, Indiana
(d) Defendants present: Anthony Zizzo and George Riojas

5. From on or about the 20th day of January, 1974, to and including the 30th day of January, 1974, defendant, Carmen Hegman received and concealed on behalf of Anthony Zizzo, James Lentini, George Riojas and others, a quantity of General Electric black and white and color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

(a) Date: On or about January 20, 1974 up to and including January 30, 1974 [Exact dates unknown]
(b) Time: Unspecified
(c) Location: 3434 Franklin Road, Highland, Indiana
(d) Defendants present: Carmen Hegman, Anthony Zizzo and George Riojas

6. On or about the 19th day of January, 1974, defendant, Joseph Vajner, rented an Econoline Van from Airways Rental Company at Gary, Indiana for the purpose of transporting, distributing and facilitating the sale of quantities of General Electric black and white and color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.



(a) Date: January 19, 1974
(b) Time: Approximately 12:30 P.M.
(c) Location: I-65 at Ridge Road, Hobart, Indiana
(d) Defendants present: Joseph Vajner

7. From on or about the 19th day of January, 1974, through and including the 29th day of January, 1974, defendant, Danny Yaksich, received and concealed on behalf of Joseph Vajner, Mickey Michael, Walter Somacki, Jr., Richard Biggerstaff and others, a quantity of General Electric black and white and color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

(a) Date: On or about January 19, 1974 through and including January 29, 1974 [Exact dates unknown]
(b) Time: Unspecified
(c) Location: 1320 Broadway, Gary, Indiana
(d) Defendants present: Danny Yaksich, Joseph Vajner and Mickey Michael

8. From on or about the 19th day of January, 1974, through and including the 29th day of January, 1974, defendant, Joseph Vajner and others delivered a quantity of General Electric black and white and color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois to George Ratkovich at Gary, Indiana.

(a) Date: On or about January 19, 1974, up to and including January 29, 1974 [Exact dates unknown]
(b) Time: Unspecified
(c) Location: 2310 West Ridge Road, Gary, Indiana
(d) Defendants present: Joseph Vajner

9. On or about the 20th day of January, 1974, Joseph Vajner, Mickey Michael and Richard Biggerstaff delivered a quantity of General Electric color television sets stolen

from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois to Walter Somacki, Jr., at Gary, Indiana.

(a) Date: On or about January 20, 1974
(b) Time: Evening hours
(c) Location: 1320 Broadway, Gary, Indiana
(d) Defendants present: Joseph Vajner and Mickey Michael

10. On or about the 28th day of January, 1974, unindicted co-conspirator Trice Eugene Morrill, rented a GMC truck from Marcus Auto Leasing Corporation at Highland, Indiana for the purpose of transporting, distributing and facilitating the sale of a quantity of General Electric black and white and color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

(a) Date: January 28, 1974
(b) Time: Approximately 5:15 P.M.
(c) Location: 8840 Indianapolis Boulevard, Highland, Indiana
(d) Defendants present: Unknown

11. On or about the 30th day of January, 1974, Trice Eugene Morrill and others delivered approximately forty-six General Electric color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois, to Anthony Sedita at Merrillville, Indiana.

(a) Date: On or about January 30, 1974
(b) Time: Approximately 9:00 P.M.
(c) Location: 690 West 58th Avenue, Merrillville, Indiana
(d) Defendants present: Unknown

12. During February, 1974, Herbert Ralph Patterson received from and repaired for Joseph Vajner, Jacque Berbesque, George Ratkovich and others, a quantity of General



Electric color television sets stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

(a) Date: February, 1974 [Exact date unknown]
(b) Time: Unknown
(c) Location: Unknown
(d) Defendants present: Joseph Vajner, Jacque Berbesque and George Ratkovich.

Respectfully submitted,
John R. Wilks
United States Attorney

By: /s/ Fred W. Grady

Fred W. Grady
Assistant United States Attorney

## GROUP APPENDIX F

UNITED STATES DISTRICT COURT
For The Northern District Of Indiana
Hammond Division

UNITED STATES OF AMERICA

vs.

FRANK ZIZZO, ANTHONY ZIZZO, EUGENE PHEBUS, GEORGE RIOJAS, JOHN PHEBUS, JOSEPH VAJNER, JACQUE BERBESQUE, DANNY YAKSICH, MICKEY MICHAEL, CARMEN HEGMAN and JOHN DECKER.

Hammond Criminal No. H CR 76-90

*Government's Response To Court's Order Of Discovery*

Comes now the United States of America by its attorney, John R. Wilks, United States Attorney for the Northern District of Indiana, and in response to the Court's written order of November 24, 1976, directing the government to set forth the time, date, and approximate location and identification of defendants present as to the third overt act listed in the indictment filed on June 24, 1976, provides the following:

From on or about the 15th day of January, 1974, through and including the 26th day of February, 1974, in the Northern District of Indiana, the defendants, Frank Zizzo, Anthony Zizzo, Eugene Phebus, George Riojas, John Phebus, Joseph Vajner, Jacque Berbesque, Danny Yaksich, Mickey Michael, Carmen Hegman and John Decker and unindicted



co-conspirators Trice Eugene Morrill, Richard Biggerstaff, Walter Somacki, Jr., James Lentini, Barbara Ladwig, George Ratkovich and Anthony Sedita and others, held meetings to discuss receiving, concealing, selling and disposing of approximately fourteen hundred General Electric black and white and color television sets which were stolen from the Chesapeake & Ohio and Baltimore & Ohio Railroad yard in Chicago, Illinois.

1. (a) Date: On or about January 15, 1974
   (b) Time: Evening
   (c) Location: 1320 Broadway, Gary, Indiana
   (d) Defendants present: Danny Yaksich, Mickey Michael
2. (a) Date: On or about January 18, 1974
   (b) Time: Unknown
   (c) Location: Glancy's Restaurant, East U.S. 20, Michigan City, Indiana
   (d) Defendants present: Eugene Phebus
3. (a) Date: On or about January 18, 1974
   (b) Time: Evening
   (c) Location: The Sands Lounge, East U.S. 20, Gary, Indiana
   (d) Defendants present: Eugene Phebus, John Phebus, John Decker
4. (a) Date: On or about January 18, 1974
   (b) Time: Shortly after 11:00 P.M.
   (c) Location: 1320 Broadway, Gary, Indiana
   (d) Defendants present: John Decker, Mickey Michael and Joseph Vajner
5. (a) Date: On or about January 19, 1974
   (b) Time: Approximately 12:00 noon
   (c) Location: 1320 Broadway, Gary, Indiana
   (d) Defendants present: Danny Yaksich, Mickey Michael and Joseph Vajner

6. (a) Date: On or about January 19, 1974
   (b) Time: Approximately 5:00 P.M.
   (c) Location: Glancy's Restaurant, E. U.S. 20, Michigan City, Indiana
   (d) Defendants present: Eugene Phebus, John Decker
7. (a) Date: On or about January 19, 1974
   (b) Time: Unknown
   (c) Location: 2310 West Ridge Road, Gary, Indiana
   (d) Defendants present: Joseph Vajner
8. (a) Date: On or about January 20, 1974
   (b) Time: Approximately 9:30 P.M.
   (c) Location: Glancy's Restaurant, E. U.S. 20, Michigan City, Indiana
   (d) Defendants present: Eugene Phebus, Frank Zizzo, Anthony Zizzo, John Decker, John Phebus & George Riojas
9. (a) Date: On or about January 21, 1974
   (b) Time: Unknown
   (c) Location: 2310 West Ridge Road, Gary, Indiana
   (d) Defendants present: Joseph Vajner
10. (a) Date: On or about January 21, 1974
    (b) Time: Late evening
    (c) Location: 1320 Broadway, Gary, Indiana
    (d) Defendants present: Mickey Michael, Joseph Vajner
11. (a) Date: On or about January 23, 1974
    (b) Time: Approximately 4:00 P.M.
    (c) Location: Glancy's Restaurant, East U.S. 20, Michigan City, Indiana



   (d) Defendants present: Eugene Phebus, John Phebus
12. (a) Date: On or about January 23, 1974
    (b) Time: Approximately 8:00 P.M.
    (c) Location: Glancy's Restaurant, East U.S. 20, Michigan City, Indiana
    (d) Defendants present: Eugene Phebus, John Phebus, George Riojas, Frank Zizzo and Anthony Zizzo
13. (a) Date: On or about January 23, 1974
    (b) Time: Evening Hours
    (c) Location: 1320 Broadway, Gary, Indiana
    (d) Defendants present: Joseph Vajner, Mickey Michael
14. (a) Date: On or about January 23, 1974
    (b) Time: Late Evening Hours
    (c) Location: Glancy's Restaurant, East U.S. 20, Michigan City, Indiana
    (d) Defendants present: Anthony Zizzo, Eugene Phebus

That the above-provided information represents the approximate date, time, location and identification of defendants present of various meetings held between January 15, 1974 through and including February 26, 1974 for the purposes described in the third overt act of the indictment filed in the above-captioned cause.

Respectfully submitted,

John R. Wilks
United States Attorney

By: /s/ Fred W. Grady
Fred W. Grady
Assistant United States Attorney

No. 78-849

# In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY ZIZZO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

JEROME M. FEIT
FRANK J. MARINE
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

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No. 78-849

ANTHONY ZIZZO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on September 27, 1978. A petition for rehearing was denied on October 26, 1978 (Pet. App. 20a). The petition for a writ of certiorari was filed on November 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the government failed to comply with the district court's order for a bill of particulars and if so, whether that failure prejudiced petitioner's defense.

2. Whether the trial court committed plain error in instructing the jury on accomplice testimony.

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of conspiring to receive, conceal, and dispose of 1400 stolen television sets, in violation of 18 U.S.C. 371 and 2315.[1] Petitioner was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-19a).

The evidence adduced at trial, the sufficiency of which petitioner does not challenge, showed that petitioner arranged for the storage and concealment, as well as the sale and delivery, of some of the stolen television sets (see Tr. 506-548, 1614-1764).

## ARGUMENT

1. Petitioner contends (Pet. 7-8, 11-12) that the trial court improperly allowed a government witness to testify that petitioner and two other co-conspirators transferred some of the stolen television sets onto vans from trailers on or about January 28 or 29, 1974, when these acts were not mentioned in either the government's bill of particulars or the indictment. This claim is without foundation.

On November 4, 1976, the district court ordered the government to specify the time, location, date, and defendants present at the commission of each of the 12 overt acts alleged in the indictment (Gov't App. D 11, 28).[2] The government provided the information for each

[1]Five co-defendants were also convicted of conspiracy; two others were acquitted. Three of the co-defendants convicted of conspiracy were also convicted of the underlying substantive offense; two co-defendants were acquitted of substantive offenses. See Pet. App. 3a.

[2]"Gov't App." refers to the appendix to the government's brief in the court of appeals.



overt act except the third (Pet. App. 2a, 26a-31a). Since the third overt act, unlike the others, alleged that the conspirators held a number of meetings from on or about January 15, 1974, through February 26, 1974, the government sought clarification of the court's order (Pet. App. 6a, 27a-28a). The district court stated that it was "aware that the information ordered as to the third overt act covers a six week period and compliance will require considerable effort," and it ordered the government to "disclose the date, time, location and defendants present *with as much specificity as is feasible*" (Gov't App. G 2; Pet. App. 6a) (emphasis supplied).

The government thereupon provided petitioner with information concerning 14 meetings held between January 15 and January 23, 1974 (Pet. App. 32a-35a)[3] but did not include information concerning petitioner's role in transferring the stolen merchandise on January 28 or 29, 1974. However, the district court made clear when it admitted evidence of unspecified overt acts that it had not intended its discovery orders to require the government to disclose every overt act it intended to prove.[4] And, as the court of appeals ruled (Pet. App. 7a-8a), the government's proof is not limited to the overt acts specified in the indictment,

[3]The government also furnished petitioner and his co-defendants prior to trial "copies of all documents which it intended to introduce into evidence" (Pet. App. 6a) and further agreed to "provide defendants with confessions, oral statements to government agents, recorded grand jury testimony and reports of physical or mental examinations and of scientific tests or experiments" (*id.* at 4a). The government also agreed to permit the defendants "to inspect or copy any of their tangible property within the Government's control" and to provide the defendants "with copies of their prior criminal records and a list of searches and seizures resulting in the acquisition of trial exhibits" (Pet. App. 4a-5a).

[4]The court stated, "I think to require that kind of specificity would * * * be an unreasonable burden on the Government. Under these circumstances, it doesn't seem to the Court that the Government should be required to set out every single detail with that kind of specificity * * *" (Tr. 756).

and a bill of particulars does not entitle a defendant to be apprised of additional overt acts. See, *e.g.*, *United States* v. *Bastone*, 526 F. 2d 971, 981 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976); *Cook* v. *United States*, 354 F. 2d 529, 531 (9th Cir. 1965).

The government provided petitioner substantial information prior to trial. As the court of appeals properly concluded (Pet. App. 4a):

> [T]he trial judge himself was best equipped to rule whether his discovery orders were obeyed by the Government and he did so rule. We will not disturb his repeated statements that the Government had given defendants requisite discovery because his rulings were tenable. As his order of November 4 clearly indicates, he did not mean to order the Government to disclose all overt acts, including those not mentioned in the indictment.

This ruling is tied to the facts of this case, and further review by this Court is unwarranted. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Even assuming *arguendo* that the government's proof varied from the bill of particulars, petitioner would not be entitled to reversal of his conviction unless the variance prejudiced his right to a fair trial. *E.g.*, *United States* v. *Horton*, 526 F. 2d 884, 887 (5th Cir.), cert. denied, 429 U.S. 820 (1976); *United States* v. *Glaze*, 313 F. 2d 757, 759 (2d Cir. 1963). As the court of appeals found (Pet. App. 8a-9a), the record shows no prejudice caused by the delay in disclosure from November 24, 1976, the date of the court's order, to December 6-18, 1976, the dates of petitioner's trial.

2. Petitioner also contends (Pet. 16-22) that the trial court improperly instructed the jury that it could convict petitioner on uncorroborated accomplice testimony if the



jury believed beyond a reasonable doubt that such testimony was true. Petitioner argues (Pet. 17-18) that application of such an instruction to exculpatory accomplice testimony, without telling the jury that they may also acquit the defendant on the basis of that testimony, was error that violated *Cool* v. *United States*, 409 U.S. 100 (1972), and conflicts with *United States* v. *Stulga*, 531 F. 2d 1377 (6th Cir. 1976). These claims are without merit.

Petitioner did not object to the court's instruction on accomplice testimony and did not request an alternative instruction (Tr. 2449-2458, 2686-2688). Thus, as the court of appeals properly held, petitioner's claim is not cognizable on appeal absent plain error. See, *e.g.*, *United States* v. *Vigi*, 515 F. 2d 290, 293 (6th Cir.), cert. denied, 423 U.S. 912 (1975).

In any event, petitioner concedes (Pet. 17) that the court's instruction would have been proper if it applied solely to inculpatory accomplice testimony. The court of appeals found (Pet. App. 14a) that the testimony of witnesses Lentini, Congales, Ladwig, and Campagna was in fact inculpatory and not exculpatory as petitioner contends (Pet. 19-20).

Lentini testified, *inter alia*, that he sold some of the stolen television sets at petitioner's request and gave the money to petitioner (Tr. 506-510, 527-531). Lentini also described petitioner's role in storing and delivering the stolen television sets (Tr. 468-495, 535-546).[5]

---

[5]Petitioner's argument (Pet. 20) that Lentini's testimony was exculpatory because he initially told the FBI that on one occasion someone other than petitioner received the proceeds from the sale of some of the televisions is not well taken. Lentini retracted that statement and testified that petitioner in fact received the money. Lentini also testified that he misinformed the FBI to protect petitioner, who was his friend (Tr. 603-605).

The court of appeals also concluded that the testimony of Congales, Ladwig, and Campagna likewise was not exculpatory (Pet. App. 14a). They did not identify petitioner at trial as having assisted Lentini in delivering some of the stolen televisions, but this omission was due to their not having seen the individuals who helped Lentini unload the sets (Tr. 341-344, 383-385, 415-419, 448-463). They inculpated petitioner on other grounds (Pet. App. 14a).

In these circumstances, petitioner's reliance upon *Cool* v. *United States*, *supra*, and *United States* v. *Stulga*, *supra*, is misplaced. In *Cool*, the accomplice's testimony that he alone possessed and had knowledge of counterfeit bills and that the petitioner had nothing to do with the crime was wholly exculpatory. The accomplices in *United States* v. *Stulga*, *supra*, similarly exculpated the defendant by testifying that he had not participated in their illegal bond cashing scheme.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

JEROME M. FEIT
FRANK J. MARINE
*Attorneys*

JANUARY 1979

DOJ-1979-01